

STATE OF MICHIGAN
COURT OF APPEALS

WHRJ, L.L.C. and REI ISLAND LAKE OWNER,
L.L.C.,

UNPUBLISHED
March 29, 2011

Plaintiffs/Counter-Defendants-
Appellants,

and

v

CITY OF TAYLOR,

Defendant/Counter-Plaintiff/Third-
Party Plaintiff-Appellee,

and

NATIONAL CITY BANK,

Third-Party Defendant-Appellee,

and

REAL ESTATE INTERESTS GROUP, INC.,

Third-Party Defendant.

No. 295299
Wayne Circuit Court
LC No. 09-008314-CZ

Before: WILDER, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Plaintiffs/counter-defendants-appellants, WHRJ, L.L.C., and REI Island Lakes Owner, L.L.C. (“plaintiffs”), appeal an order that granted defendant/counter-plaintiff/third-party plaintiff-appellee, city of Taylor’s (“defendant”) motion to vacate arbitration award and motion

for summary disposition¹ regarding third-party defendant-appellee National City Bank (“National City”). For the reasons set forth below, we reverse.

Plaintiffs argue that the trial court erred when it ruled that the issue of nonrenewal of a letter of credit was not subject to arbitration and, subsequently, vacated the arbitration award and proceedings as moot. “Whether a dispute is arbitrable represents a question of law for the courts that we review de novo.” *Madison Dist Pub Sch v Myers*, 247 Mich App 583, 594; 637 NW2d 526 (2001). Similarly, “[t]his Court reviews de novo a trial court’s decision to enforce, vacate, or modify an arbitration award.” *City of Ann Arbor v AFSCME*, 284 Mich App 126, 144; 771 NW2d 843 (2009).

On May 24, 2005, plaintiffs and defendant entered into the Island Lakes of Midtown Development Agreement (“agreement” or “development agreement”). According to the agreement, plaintiffs sought “to develop an approximately 72-acre single-family residential development consisting of 199 residential site condominium units known as the ‘Island Lakes at Midtown.’” However, the collapse of the housing market put the Island Lakes project on hold. Plaintiffs then failed to make tax payments and tax deficiency payments pursuant to the agreement, and the matter was submitted to binding arbitration in February 2009. In an opinion and award issued June 24, 2009, the arbitrator stated, “even though . . . [plaintiffs are] liable for the tax payments and tax deficiency payments . . . the amount of those payments remains in considerable dispute” and, therefore, the arbitrator stated that an additional hearing would be necessary if the parties could not come to an agreement. The arbitrator then ruled that, in the meantime, the defendant could draw on a \$1,500,000 letter of credit (which had been provided for in the agreement), “in the amounts alleged: \$261,051.78 for the alleged unpaid property taxes, and \$683,015.88 for the alleged property tax deficiency payment (\$944,067.66, total).” The arbitrator added, “[t]his draw contemplates all applicable and conceivable amounts, which are subject to adjustment, as specified herein.”

Defendant sought injunctive relief in the circuit court, and argued that it was entitled to the entire \$1,500,000 draw on the letter of credit. Defendant also filed two motions to vacate the arbitration award, one based on “mootness” and the other on the ground that the arbitrator exceeded his power pursuant to MCR 3.602(J)(2)(c). On October 30, 2009, after hearing arguments, the trial court ruled that plaintiffs’ default in failing to renew the letter of credit had not been before the arbitrator, and furthermore, pursuant to the agreement, defendant had the right to draw the entire amount of the letter, and therefore, there was no dispute to arbitrate. The trial court entered an order granting defendant’s first motion to vacate the arbitration award as moot. The order also vacated the entire arbitration proceedings. The court granted summary disposition against National City and allowed defendant to draw on the letter of credit in the amount of \$1,500,000. Finally, the order stated that defendant’s second motion to vacate the arbitration award (on the ground that the arbitrator exceeded his power) had been withdrawn.

¹ The issues on appeal pertain to the part of the trial court’s order vacating the arbitration award and proceedings.

Plaintiffs argue that the dispute regarding defendant's ability to draw on the letter of credit is within the scope of the pending arbitration. Plaintiffs first assert that the development agreement clearly and unambiguously requires arbitration between the parties, without exclusion. Further, according to plaintiffs, the arbitrator's July 30, 2009, opinion, explained that the issue of defendant's ability to collect on the letter of credit had been part of the proceedings from the outset. Plaintiffs also argue that the doctrine of judicial estoppel bars defendant's efforts to claim that the letter of credit is outside the scope of arbitration. Moreover, plaintiffs contend that the trial court improperly undertook its own interpretation of paragraph six of the agreement and rejected the arbitrator's rulings, but the merits of the claim were not within the subject of the court's review. Plaintiffs thus conclude that, pursuant to MCR 3.602(J)(2), the trial court did not have jurisdiction to vacate the arbitration based on "mootness." We agree that the trial court improperly vacated the arbitration award and proceedings.

The Michigan legislature "has expressed a strong public policy favoring private voluntary arbitration, and our courts have historically enforced agreements to arbitrate disputes." *Rembert v Ryan's Family Steak Houses, Inc.*, 235 Mich App 118, 127-128; 596 NW2d 208 (1999). "The purpose of arbitration is to avoid protracted litigation, and it will be judicially enforced to defeat an otherwise valid claim." *Cipriano v Cipriano*, __ Mich App __; __ NW2d __ (Docket No. 291377, issued August 10, 2010), slip op, p 3.

"Where an arbitration agreement provides that judgment may be entered on the arbitration award," as did the development agreement in this case, "it falls within the definition of statutory arbitration and is governed by the MAA [Michigan Arbitration Act, MCL 600.5001 et seq.]" *Jaguar Trading LP v Presler*, __ Mich App __; __ NW2d __ (Docket No. 290972, issued August 3, 2010), slip op, p 2, citing MCL 600.5001(2). An agreement to arbitrate under the MAA, "is valid, enforceable, and irrevocable except upon grounds that justify the rescission or revocation of any contract." *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146; 742 NW2d 409 (2007). "MCR 3.602 governs judicial review and enforcement of statutory arbitration agreements." *Nordlund & Assocs v Village of Hesperia*, 288 Mich App 222, 227; 792 NW 2d 59 (2010). Pursuant to MCR 3.602(J)(2), a trial court can vacate an award if:

- (a) the award was procured by corruption, fraud, or other undue means;
- (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
- (c) *the arbitrator exceeded his or her powers*; or
- (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

The fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award. [Emphasis added.]

In addition, MCR 3.602(K)(2) provides that an award can be modified or corrected if:

- (a) there is an evident miscalculation of figures or an evident mistake in the description of a person, a thing, or property referred to in the award;
- (b) *the arbitrator has awarded on a matter not submitted to the arbitrator*, and the award may be corrected without affecting the merits of the decision on the issues submitted; or
- (c) the award is imperfect in a matter of form, not affecting the merits of the controversy. [Emphasis added.]

Here, the trial court did not actually consider defendant's motion that the arbitrator acted beyond the scope of his powers pursuant to the court rules, but rather, the trial court vacated the arbitration award based on "mootness." The trial court's statements on the record, however, implicate both MCR 3.602(J)(2) and MCR 3.602(K)(2). The trial court first stated that it believed that the issue before it was whether "this letter of credit and this guaranty is an issue that *should be* submitted to arbitration." (Emphasis added.) The trial court then concluded that the issue *had not been* submitted to arbitration: "the subsequent default of failing to renew the letter of credit 20 days prior to its expiration on June 28 [2009,] was not, nor could it have been an issue [in the arbitration]." At the same time, however, the trial court seemed to acknowledge that the arbitrator had considered the nonrenewal provision, yet found it to be a penalty: "I know [plaintiffs raise] the defense that the nonrenewal provision is a punitive litigated damage provision. And I think the arbiter found the same thing, which I think was incorrect." Thus, the trial court also based its decision on a perceived error of law. The court also implied, although its language was not clear, that the issue of nonrenewal was not, in fact, subject to arbitration: "And whether the disputed issue on its face or arguably within the contract's arbitration clause, again, I think the clear language of paragraph 6 states it is a guaranty." As indicated, we hold that the issue is subject to arbitration and the trial court improperly engaged in contract interpretation.

AGREEMENT TO ARBITRATE

"The scope of an arbitrator's remedial authority is limited by the contractual agreement from which he draws his authority. Thus, arbitrators exceed their power when they act beyond the material terms of the contract from which they primarily draw their authority, *or* in contravention of controlling principles of law." *Nordlund*, 288 Mich App at 228 (internal citations and punctuation omitted; emphasis added). Accordingly, it is first necessary to examine the development agreement to determine whether the nonrenewal of the letter of credit was an issue subject to arbitration.

"Arbitration is generally recognized as a matter of contract." *Bayati v Bayati*, 264 Mich App 595, 598; 691 NW2d 812 (2004). It is true, as the trial court noted that, "[t]he existence of an arbitration agreement and the enforceability of its terms are judicial questions for the court, not the arbitrators." *Fromm v MEEMIC Ins Co*, 264 Mich App 302, 305; 690 NW2d 528 (2004). Nevertheless:

The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To ascertain the arbitrability of an issue, a court must consider

whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract. *The court should resolve all conflicts in favor of arbitration. However, a court should not interpret a contract's language beyond determining whether arbitration applies and should not allow the parties to divide their disputes between the court and an arbitrator.* Dispute bifurcation defeats the efficiency of arbitration and considerably undermines its value as an acceptable alternative to litigation. [*Id.* at 305-306 (emphasis added).]

Thus, "there is a presumption of arbitrability unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226, 235; 590 NW2d 580 (1998).

Here, the arbitration clause in the development agreement provided: "Any controversy or claim *arising out of or related to* this Agreement, or the breach thereof, shall be settled by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association." (Emphasis added.) Although the letter of credit itself was a separate document, the agreement provides for it, and addresses its expiration as follows:

The Guaranty and the responsibility for timely payment of taxes or the principal and interest payments due on the bond will be secured by [plaintiffs] providing security to . . . [defendant] in forms reasonably satisfactory to [defendant] including a Guaranty from [plaintiffs'] affiliate, Real Estate Interests Group Inc., and an irrevocable, stand by letter of credit in the amount of \$1,500,000 issued by a federally insured lending institution and in a form reasonably satisfactory to [defendant] (the "Guaranty Collateral"). The amount of the Guaranty Collateral shall be replenished, within thirty (30) days of the date of any draw down, up to the original amount if [defendant] draws down on the Guaranty Collateral at any time during the Guaranty Period due to an uncured default in [plaintiffs'] (or [their] assignee's) payment of taxes or payment of any shortfall If the Guaranty Collateral provides for any expiration date prior to the end of the Guaranty Period and [plaintiffs] do[] not cause such Guaranty Collateral to be renewed or extended within twenty (20) days prior to such expiration date, or if [defendant] draw[s] down on the Guaranty Collateral and the Guaranty Collateral is not replenished back to the \$1,500,000 within thirty (30) days from such draw down, in either case, then, [defendant] *shall have the right to draw on the Guarant[y] Collateral/Letter of Credit, in which case the funds drawn may be used by [defendant] for any purposes*, unless the amount of the Guaranty Collateral, whether in the form of drawn funds or Letter of Credit, or any combination is replenished to \$1,500,000 within an additional ninety (90) day period; otherwise, *such funds and Letter of Credit will continue to be held hereunder as the Guaranty Collateral.* [Emphasis added.]

Thus, because the letter of credit is part of the agreement, or at the very least, *related to the agreement*, and the arbitration clause does not contain any exclusions or exceptions, any dispute

regarding defendant's ability to draw on the letter of credit – including the event of its nonrenewal – is an issue subject to arbitration and the trial court erred in concluding otherwise.

WAS THE MATTER OF NONRENEWAL SUBMITTED TO ARBITRATION?

With regard to whether the arbitrator actually *did consider* the issue of the nonrenewal of the letter of credit and its effect on defendant's ability to draw the entire amount, we first note that arbitration proceedings were not, in fact, complete at the time the letter of credit expired on June 28, 2009. As indicated by the award of June 24, 2009, the amount plaintiffs owed remained in dispute and the arbitrator planned to hold further hearings in the event the parties could not come to an agreement. Moreover, despite defendant's claims to the contrary, it is evident from the arbitrator's opinion that, during the proceedings, the issue of nonrenewal was considered, and further, plaintiffs had raised the issue of whether the agreement's allowance for draw on the letter of credit to be used for "any purposes" constituted a penalty. The arbitrator was inclined to agree with plaintiffs' position, however, at that time, the letter of credit had not expired and defendant had not attempted to draw the entire amount. Moreover, the arbitrator was of the opinion that defendant was not entitled to the full amount of the letter of credit, regardless.

In its opinion of July 30, 2009 (granting plaintiffs' motion to compel access to defendant's records), the arbitrator further explained, in great detail, that:

although the specific issue of what rights [defendant] has under the Development Agreement if the Letter of Credit expired, without alternate security being provided, was not briefed, argued or decided in the context of the June 8, 2009, and June 12, 2009, arbitration hearings, the general issue of the June 28, 2009, expiration date, and the purported harm [defendant] might suffer if the Letter of Credit expired before [defendant] could collect on it has been a specifically stated fixture in these overall proceedings.

In addition, "[plaintiffs], early on, raised the issue of whether a draw on the Letter of Credit constitutes a penalty, given that, under paragraph 6 of the agreement, the funds drawn do not necessarily have to be used for purposes of rectifying any alleged injury. . . ." The arbitrator then noted that, at that point, defendant was:

attempting to draw the entire \$1,500,000 from the Letter of Credit, based on [plaintiffs'] failure to renew the instrument[T]he issue that was previously moot is now ripe because *even [defendant] acknowledges that [plaintiffs'] arrearage for tax payments and tax deficiency payments is nowhere near \$1,500,000 – as stated, it is, at the very most, \$944,067.66. Thus, [plaintiffs'] claim that a Letter of Credit draw of this magnitude is currently justiciable because damages will be paid in the amount of \$1,500,000 even though the current injury is, at most, \$944,067.66. [Emphasis added.]*

Notably, the arbitrator specifically stated that, during the proceedings on June 12, 2009, plaintiffs' counsel "stated on the record, conclusively, that the Letter of Credit would not be renewed." Thus, when he made the award, the arbitrator was aware that the letter of credit would not be renewed, but he did not believe that defendant was entitled to more than

\$944,067.66, regardless. Moreover, the arbitrator then addressed the agreement's language and whether it in fact permitted defendant to withdraw the entire amount based on nonrenewal of the letter of credit. The arbitrator stated: "*as a point of fact, the language . . . does not appear to emphatically state that the precise amount of \$1,500,000 may be drawn in the event of nonrenewal.*" (Emphasis added.) The arbitrator thus concluded that the parties needed to brief the issue and a hearing was necessary. Therefore, it is clear that the arbitrator considered the issue of nonrenewal of the letter of credit and it did not affect his award. Further, he viewed the provision at issue – if it did indeed permit defendant to draw the entire amount in the event of nonrenewal – as possibly constituting a penalty, but he did not conclusively rule on it because he intended to hold further hearings. Thus, the trial court erred in concluding that the issue was not before the arbitrator.

ERRORS OF LAW

In addition to ruling that the nonrenewal issue was not arbitrable and had not, in fact, been considered in arbitration, the trial court ruled that there was nothing for the arbitrator to consider because, in the trial court's view, the agreement's language allowed for defendant to draw the entire amount upon nonrenewal of the letter of credit, and this provision did not constitute a penalty, contrary to the arbitrator's assertions. Thus, the trial court apparently found that the arbitrator exceeded his power by committing an error of law, which constituted grounds for vacating the award. Regarding errors of law, "[w]here it clearly appears on the face of the award or the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through an error in law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made, the award and decision will be set aside." *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554-555; 682 NW2d 542 (2004). Nevertheless, "an allegation that the arbitrators have exceeded their powers must be carefully evaluated in order to assure that this claim is not used as a ruse to induce the court to review the merits of the arbitrators' decision." *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991). Thus:

Judicial review of an arbitrator's decision is narrowly circumscribed. A court may not review an arbitrator's factual findings or decision on the merits. Likewise, a reviewing court cannot engage in contract interpretation, which is an issue for the arbitrator to determine. Nor may a court substitute its judgment for that of the arbitrator. Hence courts are reluctant to vacate or modify an award when the arbitration agreement does not expressly limit the arbitrator's power in some way. The inquiry for the reviewing court is merely whether the award was beyond the contractual authority of the arbitrator. If, in granting the award, the arbitrator did not disregard the terms of his or her employment and the scope of his or her authority as expressly circumscribed in the contract, judicial review effectively ceases. Thus, as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court may not overturn the decision even if convinced that the arbitrator committed a serious error. [City of Ann Arbor, 284 Mich App at 144 (internal citations and punctuation omitted; emphasis added).]

As discussed, the issue of the nonrenewal of the letter of credit was an issue subject to arbitration, and, as the cited case law indicates, the trial court erred in engaging in its own interpretation of the development agreement and using that as a basis to vacate the award. Further, vacating the proceedings prevented the arbitrator from making a final determination regarding the amount of the payment to which defendant was entitled, which the arbitrator determined was less than \$1,500,000, based on its determination of the facts and interpretation of the agreement.²

Reversed and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Pat M. Donofrio

² Given our resolution of this issue in plaintiffs' favor, we find it unnecessary to address arguments raised about how defendant should hold funds held as collateral and whether defendant is judicially estopped from making certain arguments.